

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE: B-207987**

**DATE: July 13, 1982**

**MATTER OF: Construction Catering, Inc.**

**DIGEST:**

1. Bidder's failure to acknowledge amendment modifying or increasing a Service Contract Act wage determination requires rejection of the bid as nonresponsive to a material amendment and may not be waived as a minor informality.
2. Material IFB amendment may not be orally acknowledged.
3. Protest filed after bid opening against allegedly inadequate time to acknowledge amendment of invitation for bids is untimely under GAO Bid Protest Procedures and not for consideration on the merits.

Construction Catering, Inc. (Construction), protests the rejection of its bid under invitation for bids (IFB) No. IFB/DLS-8-82 issued by the Immigration and Naturalization Service (INS). INS rejected Construction's low bid for food services because of the firm's failure to acknowledge an amendment to the IFB prior to bid opening. The amendment contained specification changes affecting price and also substituted a new Service Contract Act wage rate determination. Construction concedes that it did not acknowledge the amendment in writing prior to bid opening. However, it contends that INS should have waived the failure to acknowledge because, prior to bid opening, INS discussed the amendment with Construction and Construction orally acknowledged the amendment by telephone. It cites our decision, 33 Comp. Gen. 509 (1954), as authorizing acceptance of a bid where oral acknowledgment of an amendment is made prior to bid opening.

Construction states that it sent its written acknowledgment by certified mail on May 18, 1982, only 3 days prior to the May 21, 1982, bid opening. Construction admits that it did not satisfy the solicitation provision

that a written acknowledgment sent by certified mail would be considered if sent not later than the fifth calendar day prior to the date specified for receipt of bids. However, Construction argues that it only received the amendment 3 days before bid opening, thus complying with this provision to the best of its ability, and its bid should have been considered. We note that INS reports it never received this certified mail acknowledgment, but on May 22, 1982, received an acknowledgment sent on May 21, 1982, by express mail.

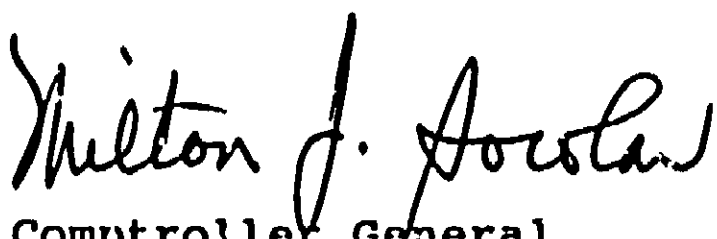
We find the protest without merit.

We have repeatedly held that amendments modifying or increasing Service Contract Act minimum wage requirements are material amendments because bidders are not obligated to pay the higher rates unless they acknowledge the amendments. Therefore, the failure to acknowledge the amendment renders the bids nonresponsive and cannot be waived as a minor informality. Gentiray and Associates, B-204013, November 30, 1981, 81-2 CPD 431; G. E. Webb, B-204436, September 21, 1981, 81-2 CPD 234. Moreover, we have specifically rejected the argument that a material IFB amendment may be orally acknowledged. MET Electrical Testing, Inc., 60 Comp. Gen. 321 (1981), 81-1 CPD 202; Hutto Appliances Refrigeration Service, B-201585, June 16, 1981, 81-1 CPD 495. Therefore, we reject Construction's contention that the amendment was properly acknowledged in oral discussions before bid opening.

Although MET Electrical Testing, Inc., *supra*, did not specifically overrule 33 Comp. Gen. 508 (1954), cited by Construction, it expressly overruled two cases, United States Cartridge Company, 60 Comp. Gen. 251 (1981), 81-1 CPD 94; Nautical Manufacturing Company, B-185198, February 24, 1976, 76-1 CPD 129, in which we had previously indicated that we would recognize oral acknowledgment of material amendments where the bidder's acknowledgment was independently verifiable. In fact, 33 Comp. Gen., *supra*, is distinguishable from the cases overruled. The decision indicates that where there is a legally binding oral acknowledgment of a nonmaterial amendment, that is, an amendment not affecting "price, quantity or quality of the work," we would not object to acceptance of the bid. In any event, here, the amendment contained a material item, the Service Contract Act wage rate determination, and our decisions require rejection of the bid as nonresponsive. Gentiray and Associates, *supra*.

Construction argues that it did not meet the 5-day requirement for an acknowledgment of an amendment by certified mail, because it did not receive the amendment until 3 days before bid opening, an insufficient time to meet the 5-day requirement. To the extent that Construction's protest filed after bid opening is alleging inadequate time to acknowledge the amendment, it is untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(h)(1) (1982), and not for consideration on the merits. Gentiray and Associates, supra; see also Alexandria Graphics & Reproduction Services, B-200249, October 7, 1980, 80-2 CPD 251. We note that while Construction initially protested to the agency by letter of May 28, 1982, that protest was untimely as well since it was also filed after bid opening on May 21, 1982.

We deny the protest in part and we dismiss it in part.

*for*   
Comptroller General  
of the United States